Nu-Temp Associates Heating and Cooling, Inc. ***and*** **Sheet Metal Workers' International Association Local Union No. 19.** Case 4–CA–30836

February 26, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

Upon a charge filed by the Union on November 6, 2001, the General Counsel of the National Labor Relations Board issued a complaint on December 11, 2001, against Nu-Temp Associates Heating and Cooling, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served with copies of the charge and complaint, the Respondent failed to file a timely answer.

On February 8, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On February 13, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent filed a response to the Notice to Show Cause.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint shall be considered to be admitted to be true. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Board's Regional Office, by letter dated January 4, 2002, notified the Respondent that it had failed to file an answer within the time prescribed by the Board's Rule. The letter also advised the Respondent that, unless an answer was received by January 11, a Motion for Summary Judgment would be filed.

The Respondent neither filed an answer to the complaint nor requested an extension of time to do so. Apparently in response to the Notice to Show Cause, however, the Respondent filed a letter with the Board on March 8, 2002. The letter states that the Respondent met with the Union on December 21, 2001, to discuss negotiations, and that it subsequently telephoned the Union several times and left voice mail messages asking the Union to contact the Regional Office to have the complaint dismissed. The letter additionally states, "due to the economy and severe lack of business we have no immediate need for any employees and have decided to downsize the company to Mom & Pop status."

The Respondent is apparently proceeding without the benefit of counsel. In determining whether to grant a Motion for Summary Judgment on the basis of a respondent's failure to file a sufficient or timely answer, the Board has shown some leniency towards pro se respondents. *Kenco Electric & Signs*, 325 NLRB 1118 (1998); *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296, 1297 (1998). Thus, the Board will generally not preclude a determination on the merits if it finds that a pro se respondent has filed a timely response, which can reasonably be construed as denying the substance of the complaint allegations. See, e.g., *Harborview Electric Construction Co.*, 315 NLRB 301 (1994). Similarly, where a pro se respondent fails to file a timely answer, but provides a "good cause" explanation, summary judgment will not be entered against it. *Lockhart Concrete*, 336 NLRB No. 88, slip op. at 2 (2001). In this case, however, the Respondent did not respond to the complaint's allegations until after the Notice to Show Cause was issued, despite having been reminded in writing to do so. Further, the Respondent's February 27 letter, which was not filed with the Board until March 8, does not establish good cause for its failure to file an answer. Thus, the Respondent alleges that it asked the Union to contact the Region to have the complaint withdrawn and it expected the Union (and the Region) to comply. However, when it received the Region's January 4, 2002, reminder letter, it became aware that the complaint had not been withdrawn. It then had until January 11 to file an answer. The Respondent did not file an answer or request an extension of time to do so.[2]

[1] The Notice to Show Cause directed the Respondent to show, in writing filed with the Board on or before February 27, good cause why the General Counsel's motion should not be granted. The Respondent's reply, though dated February 27, was not filed with the Board until March 8.

[2] A factor the Board considers in determining whether a respondent has good cause for failing to file a timely answer is whether it requested an extension of time. The Board has stated that a party's "failure to promptly request an extension of time to file an answer is a factor demonstrating lack of good cause." *Dong-A Daily North America*, 332 NLRB No. 8, slip op. at 2 (2000), quoting *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998).

In its February 27 letter, the Respondent also asserts that it has decided to downsize the company "to Mom and Pop status." Even assuming the truth of this assertion, the fact that the Respondent has decided to terminate all of its employees does not constitute good cause for its failure to file an answer. Nor is it a basis for denying the General Counsel's Motion for Summary Judgment. Even if the Respondent subsequently terminated all of its employees, that would not excuse its prior failure and refusal to bargain on or about September 10, 2001.[3] See, e.g., *Atomic Fire Sprinkler LLC*, 336 NLRB No. 81, slip op. at 1 (2001).

Accordingly, in the absence of good cause being shown for the Respondent's failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Nu-Temp Associates Heating & Cooling, Inc., a Pennsylvania Corporation with a facility in Huntingdon Valley, Pennsylvania, has been engaged in the heating and air conditioning industry as a contractor. During the 12-month period ending December 11, 2001, the Respondent, in conducting the operations described above, received gross revenues in excess of $500,000 and purchased and received at the facility goods valued in excess of $50,000, directly from points outside the State of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We also find that Sheet Metal Workers' International Association, Local Union No. 19 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time installers and helpers; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

On August 28, 2001, the Union was certified as the exclusive collective-bargaining representative of the unit, and since that date, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

The Union, on or about September 10, 2001, by telephone call; and on or about October 15, 2001, in person, requested that the Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

Since on or about September 10, 2001, the Respondent has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the unit.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing, since September 10, 2001, to recognize and bargain with the Union, we shall order the Respondent to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Nu-Temp Associates Heating and Cooling, Inc., Huntingdon Valley, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Sheet Metal Workers' International Association, Local Union No. 19, as the exclusive bargaining representative of the employees in the appropriate unit set forth below. The appropriate unit is:

[3] The Respondent's assertions may, if proven, have an effect on the remedy, however. We shall leave that issue to the compliance stage of the proceeding.

All full-time and regular part-time installers and helpers; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain in good faith with Sheet Metal Workers' International Association, Local Union No. 19 with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the unit, and, if an understanding is reached, embody that understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Huntingdon Valley, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 10, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 26, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Sheet Metal Workers' International Association, Local Union No. 19 as the exclusive bargaining representative of our employees in the appropriate unit set forth below. The appropriate unit is:

All full-time and regular part-time installers and helpers; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain in good faith with Sheet Metal Workers' International Association, Local Union No. 19, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of our employees in the unit, and put in writing and sign any agreement reached with the Union.

NU-TEMP ASSOCIATES HEATING AND COOLING, INC.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."